

87-647

No. _____

Supreme Court, U.S.

FILED

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SYLVIA E. DAVIS
INTERIOR COMMUNICATIONS ELECTRICIAN FIREMAN, U.S.
NAVY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF MILITARY APPEALS**

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QUESTION PRESENTED

Whether as a matter of due process and in accordance with federal statutes and regulations applicable to trials by courts-martial, an accused servicewoman is entitled to a court-appointed psychiatric expert to conduct an independent psychiatric evaluation in preparation for her defense of insanity.

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No. _____

SYLVIA E. DAVIS
Interior Communications Electrician Fireman,
U.S. Navy,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF MILITARY APPEALS**

Sylvia E. Davis, U.S. Navy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Military Appeals in this case.

OPINIONS BELOW

The decision of the United States Court of Military Appeals (App. A) is reported at 24 M.J. 222 (C.M.A. 1987). The opinion of the United States Navy-Marine Corps Court of Military Review (App. B) is reported at 22 M.J. 829 (N.M.C.M.R. 1986). The decision of the United States Court of Military Appeals denying petitioner's petition for reconsideration (App.C) is reported at ____ M.J. ____ (C.M.A. 1987).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on May 6, 1987. Petitioner filed a timely petition for reconsideration to that court, and the petition for reconsideration was denied on August 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1259(3) (Supp. III 1985).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment V: "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law"

STATUTES INVOLVED

Article 46 of the Uniform Code of Military Justice, 10 U.S.C. §846, provides:

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

OTHER PROVISIONS INVOLVED

Paragraph 115a of the *Manual for Courts-Martial, United States, 1969* (Revised Edition) states in part:

The trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence.

* * * *

The trial counsel will take timely and appropriate

action to provide for the attendance of those witnesses who have personal knowledge of the facts at issue in the case for both the prosecution and the defense. He will not of his own motion take that action with respect to a witness for the prosecution unless satisfied that the testimony of the witness is material and necessary. . . . The trial counsel will take similar action with respect to all witnesses requested by the defense, except that when there is a disagreement between the trial counsel and the defense counsel as to whether the testimony of the witness so requested would be necessary, the matter will be referred for decision to the convening authority or to the military judge . . . according to whether the question arises before or after the trial begins.

Paragraph 116 of the *Manual for Courts-Martial, United States, 1969* (Revised Edition) states in part:

When the employment of an expert is necessary during a trial by court-martial, the trial counsel, in advance of the employment, will, on the order or permission of the military judge . . . request the convening authority to authorize the employment and to fix the limit of compensation to be paid the expert.

Paragraph 121 of the *Manual for Courts-Martial, United States, 1969* (Revised Edition) provides in part:

If it appears to any commanding officer who considers the disposition of charges . . . or to any investigating officer. . . , trial counsel, defense counsel or . . . military judge . . . that there is reason to believe that the accused is insane . . .

or was insane at the time of the alleged offense . . . , that fact and the basis of the belief or observation should be submitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused The military judge may order a mental examination of the accused whenever he deems it appropriate notwithstanding any prior determination by the convening authority.

When the report of the observations of the officer authorized to order an inquiry under this paragraph indicates a reasonable basis for such inquiry, the matter shall be referred to a board of one or more physicians for their observation and report as to the sanity of the accused. At least one member of the board should be a psychiatrist.

Rule 706 of the Military Rules of Evidence provides:

The trial counsel, the defense counsel, and the court-martial have equal opportunity to obtain expert witnesses under Article 46.

STATEMENT OF THE CASE

During the period between February 25 and April 11, 1983, petitioner, a junior enlisted member of the United States Navy, engaged in a wide variety of disturbing and disruptive conduct at the Naval Submarine Base at Pearl Harbor, Hawaii. Petitioner was absent without authority on two occasions totalling about five hours; she was disrespectful to one commissioned officer and willfully disobeyed another; on nine occasions she either behaved with disrespect, dis-

obeyed or assaulted her superior petty officers; and there were three episodes of communicating threats to other Navy personnel. For these offenses petitioner was brought to trial. Pursuant to his authority under the Uniform Code of Military Justice,¹ the Commanding Officer of the Naval Submarine Base convened a special court-martial composed of officer members to hear the case against petitioner. Her trial commenced on April 15, 1983.

At the initial court-martial session petitioner's counsel asked the trial judge to order an inquiry into her mental status as permitted by the Manual for Courts-Martial.² R. 12. This examination was conducted on April 22, 1983 by two medical officers from the Naval Regional Medical Clinic at Pearl Harbor, Hawaii. At least one of these officers was a psychiatrist. Their conclusion was that petitioner was sane at the time of the offenses and that she possessed the capacity to stand trial. P.E. 3.

In addition to the strange behavior which prompted the charges against her, petitioner's subsequent actions aroused suspicions that she might have a mental problem. After petitioner was arraigned, her former defense counsel, whom she had relieved of all duties regarding her case, was called as a defense witness testifying that petitioner had made inappropriate responses to his questions and at times ignored his presence. Petitioner's behavior during the court proceedings also cast suspicion on her mental condition. During testimony of one witness (Lieutenant Feste) she cried; and in responding to procedural

¹ Article 22, UCMJ, 10 U.S.C. §822.

² Para. 121, *Manual for Courts-Martial*, 1969 (Rev.Ed.).

questions from the military judge, she exhibited what the military judge termed an "inappropriate affect." R. 7-22, 66.

The trial judge ruled that competency to stand trial was an issue. R. 66. The burden was upon the government to establish competency to stand trial by a preponderance of the evidence.³ *Id.*

Prosecuting counsel called the government psychiatrist who had previously examined petitioner pursuant to the court order. After sundry technical testimony concerning personality disorders and psychoses, he opined that petitioner was competent to stand trial, R. 81, and the trial judge ruled that this was the case, R. 88.

Defense counsel then informed the military judge that he intended to place petitioner's sanity before the court as a defense. R. 89. He described that the day before he formally requested the convening authority to employ a civilian expert and requested a court order providing for a civilian psychiatrist for interview. R. 89. The trial judge responded:

I perceive no need, nor any underlying basis for such order and therefore I decline to order that the accused be examined by another psychiatrist. Of course should the accused desire to do so on her own initiative or upon her own resources, I'm prepared to order that the accused be produced at reasonable times and opportunities, but I decline to direct any further mental status evaluation of the accused at this juncture.

Id.

³ Para. 122, *Manual for Courts-Martial*, 1969 (Rev.Ed.).

The trial continued. Defense counsel was then compelled to present an insanity defense based solely on testimony of lay witnesses and without the assistance of psychiatric expertise. Testimony from these *lay* witnesses provided the court merely a glimpse of petitioner's bizarre behavior:

1. Petitioner had difficulty looking people in the eye unless she was angry. R. 197.
2. She often daydreamed. R. 206.
3. She laughed and talked to herself. R. 197.
4. She was frequently observed crying, yelling and screaming. R. 219.
5. Petitioner's conduct at times was enraged and uncontrollable. R. 227.
6. Shortly after she entered the brig, she had been classified as a suicide risk. R. 237-8, 242-59.
7. In her cell, she made a habit of crawling under her bed, assuming a fetal position with here face toward the wall, and often slept in this manner. R. 240, 256, 267.

To rebut petitioner's insanity proffers, the prosecution relied again on the testimony of its government expert psychiatrist, Lieutenant Commander Martin. R. 283. This psychiatrist repeated that petitioner's malady was a mere personality disorder. R. 288. Defense counsel cross-examined without benefit of any expert psychiatric assistance.

After presenting the merits of her case, petitioner was convicted of a large majority of the offenses charged. R. 370. She was sentenced to reduction to

the lowest enlisted pay grade, confinement at hard labor for 45 days, forfeiture of \$200.00 pay per month for six months, and discharge from the naval service with a bad conduct discharge. R. 412.

While petitioner's case was pending evaluation at the United States Navy-Marine Corps Court of Military Review, the first stage of appellate review, the reviewing court agreed to attach to the record of trial a document from appellant's health record describing post-trial psychiatric treatment at the Naval Hospital, Oakland, California, from 19 July to 16 August 1983 for "Schizophrenia paranoid type chronic, with acute exacerbation EPTE." Comments of the psychiatrist also revealed an earlier hospitalization for psychosis occurring prior to petitioner's enlistment in the Navy. On 16 February 1984, the Navy-Marine Corps Court ordered another psychiatric examination to determine if petitioner possessed sufficient mental capacity to cooperate intelligently with her counsel on her appeals. This report was attached to the record, and it opined that petitioner could understand and cooperate with her counsel regarding the pending appellate proceedings. The court also attached to the court papers the 28 March 1984 report of a psychiatric evaluation documenting that petitioner was being treated by a psychiatrist at Fort McClellan, Alabama. This treatment was for "Schizophrenia, Chronic, Undifferentiated Type, In Remission." This document characterized the disease as existing prior to commencing naval service and its symptoms were manifested by "auditory and visual hallucinations, paranoid ideation, delusions of being controlled, delusions of thought insertion, psychomotor agitation and retar-

dation, difficulty concentrating, depressed mood, hostile manner, and labile affect.”⁴

Petitioner complained to the U.S. Navy-Marine Corps Court of Military Review that the decision of the military judge in denying her request for appointment of a civilian psychiatrist for a evaluation was erroneous and constituted prejudicial error. That court determined that an abuse of discretion standard was applicable and concluded that the military judge did not abuse his discretion. Petitioner next complained to the United States Court of Military Appeals. Upon consideration of the issue presented, that court set aside the decision of the lower court and directed the Court of Military Review to consider the question whether the psychiatric procedures employed in petitioner’s case satisfied the constitutional requirements of *Ake v. Oklahoma*, 470 U.S. 68 (1985). In compliance with this order, the lower court reevaluated petitioner’s case and emphasized that sanity at the time of the offense was a “substantial factor” at petitioner’s trial triggering the government’s responsibility under *Ake v. Oklahoma*, that indigence was not a factor for military personnel, and that the military procedures employed (examination by board of two medical officers one of whom was a psychiatrist) did comply with *Ake* requirements.⁵ That court determined that petitioner was “not entitled to a diagnosis of her choice but rather a fair and impartial evaluation of her mental condition, and she got ex-

⁴ These psychiatric reports make obvious the likelihood of a different trial result had the constitutional assistance of psychiatric expertise been available to the defense.

⁵ *United States v. Davis*, 22 M.J. 829 (N.M.C.M.R. 1986), *aff’d* 24 M.J. 222 (C.M.A. 1987).

actly that." The court stressed that this group of physicians was a neutral body not under the control of the convening authority or law enforcement officials, but rather was composed of medical personnel. The Court of Military Review also determined that this accused could have availed herself of her conventional rights to have expert testimony by meeting the burden of showing materiality and necessity under paragraph 116 of the Manual for Courts-Martial. Having found no constitutional infirmity, the Court of Military Review again affirmed the findings and sentence except for the bad conduct discharge which the court had previously set aside. The United States Court of Military Appeals was again requested to favorably endorse petitioner's claim of error, but the court rejected the accused's plea and summarily affirmed the findings and sentence. A timely petition for reconsideration to that court was denied.

Petitioner has followed all military and appellate procedures in raising the question of this improper denial of expert psychiatric evaluation and its substantial interference with her right to a fair trial. The question was considered at trial and by every reviewing authority. Petitioner's claim was rejected by all.

REASONS FOR GRANTING THE PETITION

Not only do the military procedures in this case fail to pass constitutional standards as defined by this Court, but they fail to comply with fundamental presidential and congressional policies that have existed for many years. The question presented raises substantial constitutional and procedural due process issues for military criminal practice. Petitioner's criminal offenses pale in seriousness compared to

those of many who approach this Court for consideration; however, the results of the appellate decisions in her case will permit the principles mandated in *Ake v. Oklahoma* to be totally ignored in many trials by court-martial. They will cause a serious erosion in the concepts of fair play, due process and equal opportunity which both Congress and the President have attempted to ingrain in the military criminal system.

In this case, a military accused, who demonstrated obvious indications of a mental defect, whose sanity was held a significant factor at trial,⁶ whose competency to stand trial was placed in issue and litigated, and who informed the trial judge that insanity would be pleaded as a defense, was denied the appointment of a competent and independent expert to evaluate her in preparation for her defense. The requested evaluation by an expert was, at a minimum, her due. As the petitioner struggled to present a viable insanity defense through the testimony of lay witnesses, the government simply countered with expert testimony from its own military psychiatrist from its own local military hospital. The government's expert presented to the court his esoteric and erudite analysis of personality disorders and psychoses, finally concluding that petitioner suffered merely the presence of a borderline personality disorder. Without an expert evaluation and assistance for the petitioner, her attempt to assemble an insanity defense was doomed to a dismal and certain failure. The failure occurred because the accused was denied a due process right. That right was the appointment of *her* expert so she could obtain an evaluation and whatever other assistance she might require.

⁶ *Davis*, 22 M.J. at 832.

Both the Congress and the President, under his statutory⁷ and constitutional authority, have attempted to assure military criminal defendants such as petitioner that when any witness or evidence is needed, such will be provided:

The trial counsel, the defense counsel, and the court-martial shall have *equal* opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

Article 46, Uniform Code of Military Justice, 10 U.S.C. §846 (emphasis added). Regulations prescribed by the President involving access to expert witnesses are contained in Rule 706 of the Military Rules of Evidence which provides: "The trial counsel, the defense counsel, and the court-martial have equal opportunity to obtain expert witnesses under Article 46" and Paragraph 116 of the *Manual for Courts-Martial, United States, 1969* (Revised Edition) which specifies that:

When the employment of an expert is necessary during a trial by court-martial, the trial counsel, in advance of the employment, will, on the order or permission of the military judge . . . request the convening authority to authorize the employment and to fix the limit of compensation to be paid the expert.

Although this statute and these regulations speak to equality and fairness, even these provisions of law may fall short of explicitly providing the minimum due process requirements of expert assistance in eval-

⁷ Article 36, UCMJ, 10 U.S.C. § 836 (1982).

uation, preparation and presentation of the defense. Their general purpose, however, is to encourage fairness and equality in military criminal proceedings. This Court is the final resort of petitioner and others like her whom the military system refuses to provide constitutionally required fairness and due process of law in the matter of expert psychiatric assistance.

Petitioner's right to have expert evaluation and any other help she required does not depend on her indigence.⁸ The military rule at the time of petitioner's court-martial, and still in effect today, is that all necessary and material witnesses for the defense are to be provided at government expense.⁹ The military courts recognize the right of an accused to have an "equal opportunity to obtain witnesses and other evidence" and to have this opportunity without cost. The United States Court of Military Appeals has on many occasions proclaimed that "as a matter of military due process, servicemembers are entitled to investigative or other expert assistance when necessary for an adequate defense, without regard to indigency." *United States v. Garries*, 22 M.J. 288, 290 (C.M.A. 1986), *cert. denied*, 55 U.S.L.W. 3392 (U.S. December 1, 1986) (No. 86-501); *see also United States v. Mustafa*, 22 M.J. 165, 169 (C.M.A. 1986), *cert. denied*, 55 U.S.L.W. 3332 (U.S. November 10, 1986) (No. 86-

⁸ Paragraphs 115 and 116, *Manual for Courts-Martial*, 1969 (Revised Ed.). *See also United States v. Mustafa*, 22 M.J. 165, 169 (C.M.A. 1986), *cert. denied*, 55 U.S.L.W. 3332 (U.S. November 10, 1986) (No. 86-143).

⁹ Petitioner indeed may have been indigent. She proclaimed to the court that she could not afford the services of a civilian lawyer and therefore accepted free military counsel of her choice. R.20.

143); *United States v. Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964). However, it is now clear that in military criminal trials there exists no entitlement to any independent psychiatric consultation irrespective of indigency.

Petitioner's problem was not so much a deprivation of these military due process rights as it was a deprivation of *constitutional* due process rights. The accused was evaluated by two military medical professionals, and their opinion was that she was sane at the time of the offenses and at the time of trial. Subsequent to the exam, petitioner's bizarre behavior while in confinement, and inappropriate behavior while in the courtroom, convinced the defense counsel that the opinion of these professionals was incorrect.¹⁰ Recognizing the obvious inevitability that these experts would later be prosecution witnesses in the government's attack on the accused's insanity defense, defense counsel requested an evaluation by a civilian expert. Petitioner needed an independent psychiatrist for evaluation, advice and assistance since the government's psychiatrist had failed to consider behavioral matters which the defense determined to be important. While the provision of a civilian expert is not required, due process does require an *independent* expert to assist the defense.

One of the examining medical officers, a psychiatrist, was the prosecution's main witness against petitioner on the insanity issue. The professional opin-

¹⁰ Post trial examinations by other psychiatrists proved the defense counsel correct. Not only did petitioner suffer from a psychosis, but she had exhibited psychotic problems prior to her enlistment in the Navy!

ions of both the testifying expert and his associate became Prosecution Exhibit 3. These conclusions were admitted into evidence against petitioner smashing any hope that petitioner's feeble lay witness testimony would accurately demonstrate her insanity. The conclusion of the U.S. Navy-Marine Corps Court of Military Review was that this group of medical officers was a neutral body not under the control of the convening authority or law enforcement officials, but rather merely composed only of medical personnel.¹¹ Consequently no other evaluations were constitutionally required. This analysis misses the point of the adversary purpose in criminal trials. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). How can advocacy be partisan when a defense counsel is expected to use a prosecution witness for help in advancing his client's cause? Availability of this group of two medical experts certainly did not suffice as the "access" contemplated by *Ake* where one of the doctors was a prosecution witness and the report of evaluation of both doctors was admitted as a prosecution exhibit. This Court in its holdings requiring "meaningful access to justice" for indigent defendants has never required a defendant to utilize a prosecution witness to provide help and assistance to the defendant's case. On the contrary, "meaningful access to justice requires consultation with one's own, not the adversary's, psychiatric expert so the defense counsel may "know the probative questions to ask of the opposing

¹¹ *Davis*, 22 M.J. at 832.

party's psychiatrists and how to interpret their answers." *Ake*, 470 U.S. at 80.

When sanity is a defense at a military criminal trial, the opinions of this military board of medical experts will determine whose witnesses they become. The decision of the Court of Military Appeals let stand a lower court decision which tells this petitioner and all like her that these experts, who will inevitably be prosecution witnesses against them in sanity defense litigation, are also available for their use. This decision does not comport with *Ake's* constitutional requirements. It is a corruption of the adversarial process so necessary for the discovery of truth.

Psychiatrists differ in their conclusions. This is evidenced by a comparison of the testimony of the government psychiatrist at trial and the psychiatric documents attached to the record after the court-martial concluded. This Honorable Court has recognized that

[p]sychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on the likelihood of future dangerousness. Perhaps because there is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary fact finders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party.

Ake, 470 U.S. at 81.

Our adversary system rests on certain basic assumptions: *first*, that an accused person is presumed innocent; *second*, that guilt must be established in an adversary proceeding . . .; and *third*, that the two adversaries may be aided by advocates capable of rendering effective assistance to the cause.

ABA Standards Relating to the Administration of Criminal Justice, Providing Defense Services, at 141 (1968).

For the representation provided to be effective, defense counsel must be provided with adequate resources for investigation and the employment of experts to assist in preparation of the case.

Id. at 143.

Military accuseds have been promised more than petitioner received. In Article 46, Uniform Code of Military Justice, 10 U.S.C. §846, Congress commanded that an *equality* should exist between defense and the prosecution in obtaining evidence and witnesses. Such is necessary to achieve fairness in this highly structured, disciplined and command-oriented society. Equality of opportunity is the issue here.¹²

The Court of Military Appeals has nevertheless been remiss in demanding that the congressional mandate be followed by the lower military courts. Petitioner's case is a prime example of the failure of the trial judge, the Court of Military Review and the Court

¹² See, Hearings on H.R. 2498 before a Subcommittee of the House Armed Services Committee, 81st Congress, 1st Session (1949), reprinted in *Index and Legislative History of the Uniform Code of Military Justice* (1949), at 1057-58.

of Military Appeals to follow both the executive and congressional requirement of "equality of opportunity" without cost to the accused.

By affirming the Court of Military Review's decision in this case, the U.S. Court of Military Appeals has let stand a lower court conclusion that in all cases similar to that of the petitioner, a defendant with a legitimate sanity defense is entitled only to a *fair and impartial evaluation of her mental condition*; and it is now perfectly acceptable under military legal jurisprudence that the evaluation be performed by potential prosecution witnesses. This holding it light years away from this Court's mandate in *Ake* that defendants are entitled to, at a minimum, access to a competent psychiatrist who will conduct an appropriate examination and assist as needed in evaluation, preparation, and presentation for the defense.

Here the defense counsel requested the trial judge to order an inquiry into the mental status of the accused under provisions of para. 121, *Manual for Courts-Martial, 1969* (Rev. Ed.). Two medical officers interviewed petitioner and submitted a written opinion that petitioner was sane. Subsequently petitioner's bizarre behavior while in confinement and inappropriate behavior while in the courtroom convinced the defense counsel that the opinion of these psychiatrists was incorrect.¹³ Recognizing the obvious inevitability that these psychiatrists would later be prosecution witnesses in the government's attack on the accused's

¹³ Post trial examinations by other psychiatrists proved the defense counsel correct. Not only did petitioner suffer from a psychosis, but she had exhibited psychotic problems prior to her enlistment in the Navy!

insanity defense, defense counsel requested an evaluation by a civilian expert. Petitioner needed this independent psychiatric evaluation to buttress her defense. Congress promised her "equal opportunity" to obtain evidence and witnesses. The Constitution guaranteed her due process of law through access to a competent psychiatrist to conduct an examination and assist in her defense if needed. The military courts provided her nothing. That she was a paranoid schizophrenic before she joined the Navy, at the time of her offenses, and after trial is a certainty.

The military judge rejected petitioners request for the civilian expert and provided her with *no* psychiatric assistance. He did this irrespective of petitioner's exhibited strange behavior and defense counsel's notification that petitioner's insanity would be asserted as a defense to the charges. In reviewing the judge's ruling The U.S. Navy-Marine Corps Court of Military Review found that sanity was a significant factor at trial triggering the government's responsibility pursuant to *Ake*, and that the totality of the available military procedures (primarily paragraphs 116 and 121, MCM, 1969) satisfied the appellant's right to such psychiatric aid. The court reasoned that the psychiatric evaluation board provided by paragraph 121 combined with the accused's access to funds for her own psychiatric expert witness through paragraph 116 were sufficient to meet her due process requirements for expert psychiatric assistance at trial. However, neither paragraphs 121 nor 116 provide the defendant with assistance in evaluation, preparation, or presentation exclusively for the defense, which the government must, at a minimum, provide under *Ake*. In cases such as this where the members of the psy-

chiatric board become witness for the government, paragraph 121 is *constitutionally worthless* in meeting *Ake* requirements. Paragraph 116, on the other hand, requires a showing of necessity and materiality of the expert's testimony. In cases where *Ake* requirements are in issue, there is *no expert testimony* on which to demonstrate necessity and materiality; part of what the appointment is needed for is the exact expert testimony the reviewing court has determined is required for approval of the request. This is indeed inconsistent and, of course, constitutionally infirm. The military reviewing courts have taken this Court's standard's in *Ake* and imposed additional and impermissible burdens upon military defendants. The additional burdens so imposed are unfair and unconstitutional.

The actions of the trial judge and the decisions of the military appellate courts in this case fail to pass constitutional standards as defined by this Court in *Ake v. Oklahoma*. They fail to comply with fundamental presidential and congressional policies guaranteeing fairness and equality to military defendants. They denied a mentally disturbed young service-woman a fair opportunity to defend herself.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES,)	USCMA	Dkt.	No.
<i>Appellee</i>)		51801/NA	
)	CMR Dkt. No.	83-5411	
)			
)		ORDER	
v.)			
)			
)			
SYLVIA E.)			
DAVIS (422-82-7402),)			
<i>Appellant</i>)			

On further consideration of the granted issue (20 M.J. 378) in light of *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986), it is, by the Court, this 6th day of May, 1987,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III

Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (CORNELL)
Appellate Government Counsel (MUSCHAMP)

APPENDIX B

**DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVALL STREET
ALEXANDRIA VA 22332-2400**

**IN THE U.S. NAVY-MARINE CORPS COURT OF
MILITARY REVIEW BEFORE**

**JOHN W. KERCHEVAL II MICHAEL D. RAPP JOHN E. GRANT,
JR.**

UNITED STATES

V.

**Sylvia E. DAVIS, 422 82 7402
Interior Communications Electrician
Fireman (E-3), U. S. Navy**

PUBLISH

NMCM 83 5411

Decided 27 June 1986

Sentence adjudged 3 June 1983. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Submarine Base, Pearl Harbor, HI 96860.

**LCDR FREDERICK N. OTTIE, JAGC, USN, Appellate
Defense Counsel**

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**LCDR JOHN B. HOLT, JAGC, USN, Appellate
Government Counsel**

RAPP, Judge:

Contrary to her pleas the appellant was convicted by a special court-martial with members of two brief unauthorized absences, disrespect to a commissioned officer, disobedience of a commissioned officer, disrespect to five different superior petty officers, disobedience of two su-

perior petty officers, assault on two superior petty officers, and threats against three naval personnel. She was sentenced to a bad conduct discharge, 45 days confinement at hard labor, forfeiture of \$200.00 pay per month for six months, and reduction to pay grade E-1. The convening authority approved the adjudged sentence without change. The case was first submitted to this Court with a single assigned error alleging that the adjudged bad conduct discharge was inappropriately severe. Subsequently the appellant moved for (1) attachment of a health record entry pertaining to her mental condition after completing her adjudged confinement, and (2) accomplishment of a new paragraph 121, *Manual for Courts-Martial, United States, 1969 (Rev.)* (MCM, 1969) inquiry—"sanity board"; we granted both motions. After some delay the sanity board was completed and the results were filed with us. Based on the sanity board report and the report of further psychiatric evaluation newly filed in this Court, the appellant submitted three additional assignments of error:

THE MILITARY JUDGE ERRED TO THE
SUBSTANTIAL PREJUDICE OF APPELLANT
WHEN HE DENIED THE DEFENSE MOTION
FOR APPELLANT TO BE EXAMINED BY A
CIVILIAN PSYCHIATRIST.

THE APPELLANT WAS INCOMPETENT TO
STAND TRIAL.

THE APPELLANT WAS INCOMPETENT AT
THE TIME OF THE OFFENSES.

By our decision of 14 December 1984¹ we disapproved the adjudged bad conduct discharge, but rejected the other assignments of error and otherwise affirmed the findings and sentence. By order of 11 July 1985 the Court of Military Appeals set aside our decision and returned the case to us for consideration of a specific issue:

¹ *United States v. Davis*, No. 83 5411 (NMC MR 14 December 1984).

WHETHER THE PSYCHIATRIC PROCEDURES EMPLOYED IN THIS CASE SATISFY THE REQUIREMENTS OF *AKE V. OKLAHOMA*, 470 U.S. _____, 105 S.Ct. 1087 [84 L.Ed.2d 53] (1985).

In *Ake*, Justice Marshall specified the issue as:

[W]hether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.

Ake, 470 U.S. at _____, 105 S.Ct. at 1090, 84 L.Ed.2d at 58. Justice Marshall noted that a defendant must have a "fair opportunity to present his defense" and that this is an "elementary principle grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness." *Id.*, 105 S.Ct. at 1093, 84 L.Ed.2d at 61. A criminal trial is fundamentally unfair, he opined, if the state does not make certain that a defendant "has access to the raw materials integral to the building of an effective defense" or the "basic tools of an adequate defense." 105 S.Ct. at 1094, 84 L.Ed.2d at 62. Turning to the area of psychiatric aid, Justice Marshall pointed out that, "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." 105 S.Ct. at 1095, 84 L.Ed.2d at 64. This is because psychiatrists assist lay jurors, who generally lack training in psychiatric matters, by investigation, interpretation, and testimony. *Id.* Due to the inexact nature of psychiatry and disagreements among psychiatrists, jurors are faced with issues that are complex and foreign, so that the testimony of psychiatrists can be crucial and

virtually necessary if an insanity plea is to have any chance of success. In particular,

without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high.

Id., 105 S.Ct. at 1096, 84 L.Ed.2d at 65. Justice Marshall commented, however, that a defendant's mental condition is not at issue in every criminal proceeding, but rather the "risk of error from denial of such assistance, as well as its probable value, are most predictably at their height when the defendant's mental condition is seriously in question," so the defendant would have to make a "threshold showing . . . that his sanity is likely to be a significant factor in his defense." 105 S.Ct. at 1097, 84 L.Ed.2d at 66. The Supreme Court therefore held that

when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. The Court qualified its holding, however, by pointing out that the defendant did not have a constitutional right "to choose a psychiatrist of his own liking or to receive funds to hire his own," and that the decision would be left to the states on how to implement this right. *Id.*

At trial the issue of the appellant's mental condition was raised in several contexts: in the military judge's decision to order a sanity board and in the results thereof,

by motions asserting lack of mental capacity at the time of trial and requesting funds to retain a civilian psychiatrist of her choice, through government and defense evidence on the merits regarding the defenses of lack of mental responsibility and partial mental responsibility, at the sentencing stage, in arguments by counsel and in the military judge's instructions on findings and sentence. Accordingly, we find that the appellant's sanity was a "significant factor" at her trial, triggering the Government's responsibility pursuant to *Ake v. Oklahoma*.

At the time of the appellant's offenses and trial, several provisions of the MCM, 1969 dealt directly with an accused's mental responsibility, capacity, impairment, or deficiency. See MCM, 1969, paragraphs 120-124. Additionally, paragraph 116, MCM, 1969 provided for the employment of expert witnesses, including a psychiatrist, on behalf of an accused. Paragraph 121, MCM, 1969, provided for a "board of one or more physicians," including at least one psychiatrist, which would conduct an examination of an accused to determine his or her sanity. This board was broadly empowered to "place the accused under observation, examine him, and conduct any further investigation that it deems necessary." Provisions were made for the confidentiality of the board's report. The inquiry described in paragraph 121 could be ordered before an accused's case was referred to trial, in the course of the trial itself, or even during the various stages of post-trial review. See also MCM, 1969, paragraph 124. The paragraph 121 inquiry was triggered by a minimum threshold showing: any commanding officer, investigating officer, trial counsel, defense counsel, military judge or member of the court could recommend such inquiry upon the mere "reason to believe that accused is insane . . . or was insane at the time of the alleged offense," and, if the information present to the officer authorized to order a paragraph 121 inquiry indicated a "reasonable basis" for such inquiry, one "shall" be ordered. Furthermore, Military Rule of Evidence 706(a)

specifically extended the equal access provision of Article 46, Uniform Code of Military Justice (UCMJ) to expert witnesses. Paragraph 116, MCM, 1969, authorized the payment of expert witness fees in excess of normal witness fees, thus providing a route for an accused to seek reasonable funding for a psychiatrist of the accused's own choice. The requirements of paragraph 115, MCM, 1969, applied to such requests; i.e., compliance with certain procedural steps and a showing that the witness's (sic) testimony was material and necessary. As with other Codal and Manual rights, indigency of an accused was not a consideration. See *United States v. Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964).

Comparing the provisions for a military accused's access to psychiatric assistance and evaluation with the Constitutional requirements described by Justice Marshall, we conclude that the military system passes muster. The minimum required to trigger a paragraph 121 inquiry for an accused was well within the "threshold showing" that an accused's "sanity is likely to be a significant factor in his defense" which Justice Marshall has said will activate a state's obligation. The paragraph 121 inquiry board was a neutral body not under the control of the convening authority or law enforcement officials, but rather was composed of medical personnel, conducted its proceedings at a medical facility, followed medical procedures, and provided medical opinions. The requirement for multiple members and the broad powers contributed to a comprehensive, objective inquiry. We do not interpret Justice Marshall's exhortation to "assure the defendant access" to a psychiatrist as requiring that the Government (1) appoint a psychiatrist especially for the appellant or (2) guarantee her a psychiatrist who agrees with her position, in the context of his caveats that a defendant has no right to a psychiatrist of his "personal liking" or to funds for hiring "his own" psychiatrist. Instead, we are persuaded that Justice Marshall's goal was the availability of impartial

psychiatric advice to the defense as a safeguard against (1) "stacking the deck" against an indigent defendant by a psychiatrist in league with the prosecution² or (2) denying an indigent the means to produce enough evidence of a sanity defense to shift the burden of disproving it to the Government.³ In the military context, however, the first situation was forestalled by the neutral character of the paragraph 121 inquiry board, as we discussed in detail above, and the second is inapplicable in military law, where the accused's sanity could be put into issue merely by "some evidence which could reasonably tend to show that the accused is insane . . . or was insane at the time of his alleged offense." MCM, 1969, paragraph 122. This evidence could be credible lay testimony as well as expert opinion. Furthermore, the accused could even obtain funds for his or her own psychiatrist by utilizing the readily-available provisions of paragraph 116, MCM, 1969. Accordingly we find that the totality of the available military procedures satisfied the appellant's right to psychiatric aid as specified in *Ake v. Oklahoma*. See *United States v. Mustafa*, 22 M.J. 165 (C.M.A. 1986).

Having determined that military procedures satisfied requirements of *Ake v. Oklahoma*, we must evaluate the application of those procedures to this appellant. We need

² See *Ake*, 105 S.Ct. at 1098, 84 L.Ed.2d at 67, where Justice Marshall illustrates the need for impartial psychiatrists by referring to two earlier cases: in *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 73 S.Ct. 391, 97 L.Ed. 549 (1953), "neutral psychiatrists in fact had examined the defendant as to his sanity and had testified on that subject at trial" (emphasis added); in *McGarty v. O'Brien*, 188 F.2d. 151 (1st Cir. 1951), "the defendant had been examined by two psychiatrists who were not beholden to the prosecution." (Emphasis added.)

³ Although psychiatrists testified in other matters at Ake's trial, there was no testimony for either side on his sanity at the time of the offenses; yet he had the burden under Oklahoma law of presenting evidence sufficient to raise a reasonable doubt about his sanity at the time of the offenses, and only then did the burden shift to the Government to prove his sanity.

to consider only those matters known to the military judge at the time of the defense motion for government funds to hire a psychiatrist. At that time the military judge had read the charges and specifications before him and had noted "verbal responses and verbal behavior" of the appellant which he described as "apparently or potentially inappropriate, such as smiling, laughing silently or crying." He had also heard the testimony of the appellant's original trial defense counsel regarding unusual behavior of the appellant which counsel observed and difficulties counsel experienced in communicating with her to prepare a defense. The military judge had observed the appellant's demeanor and comprehension of the proceedings during several hours of trial on different days, including discussion of her rights to counsel and her desires as to pleas and type of forum. Additionally, the military judge had the benefit of the testimony of Doctor (LCDR) M, the psychiatrist member of the appellant's paragraph 121 inquiry board. That inquiry, Doctor M testified, consumed as much as eight hours over a period of two months and included an intensive personal interview with the appellant, an extensive personal history questionnaire, the Minnesota Multiphasic Personality Inventory consisting of 500-600 questions, other tests designed to determine the internal factors of an individual's personality (sentence completion test, house-tree-person test), and conversations with the appellant's supervisors and other knowledgeable sources. On the basis of these methods and tests, which are commonly used in this type of situation and are considered dependable, LCDR M and the other member of the inquiry board determined that the appellant had a "Borderline Personality Disorder," which he defined and explained in detail:

[I]t falls within that category of disturbances called the personality disorders, meaning an inherent, long-standing pattern usually involving maladapted behavior or attitudes. These are usu-

ally seen from an early age and they usually result from difficulties with the home environment. In other words, a fairly long history of difficulties that this person's had. Now, specifically the Borderline Personality Disorder is characterized by instability in a number of areas. Their behavior tends to be impulsive, erratic, [sic] sometimes unpredictable and self-damaging. Their mood tends to be unstable, they tend to have marked shifts from euphoria to depression, there is very frequently seen intense anger including displays of anger, and sometimes unpredictable and impulsive displays. Their interpersonal relationships are generally unstable in the sense of being either shallow and superficial or overly clingy and dependent. Frequently, there is a lot of turmoil in their interpersonal relationships, marked shifts of attitude, one day they are deeply in love, the next day they want no more to do with the person. So, instability in a wide variety of areas, I think would be kind of the bottom line as far as characterizing that Borderline Personality organization.

Doctor M pointed out that a person, like appellant, suffering from this disorder would be able to understand the nature of the proceedings against her and to cooperate in her defense. Also, he commented that the appellant was a "highly intelligent individual" who "knows very much what's going on around her, but at times seems not to choose to conform her behavior to what is either asked of her or appropriate in the context," and that her occasional inappropriate or unusual behavior was consistent with such a personality disorder, because it is "inherent in the disorder that there is going to be pervasive hostility, mistrust, defiance of authority . . . but . . . these things are within the capacity of the individual to control." Doctor M opined that the appellant's condition would not have

significantly changed between his last contact with her and the time of trial, that a person with a borderline personality disorder does not turn into a schizophrenic, and that she did not exhibit the characteristics of a psychotic (delusions, hallucinations, nonvolitional actions), but that she could "look crazy" to an untrained observer when she was in reality consciously being deceptive. He described her attitude in meetings with him as generally "very appropriate" but that "when confronted with stress or with a refusal to comply with a request that she might make, then there would be subsequent defiance or displays of temper or accusations." In support of the defense motion the appellant's individual military counsel submitted nothing specific but generally argued that Doctor M had misdiagnosed the appellant, that her condition had changed since the last time Doctor M observed her, and that her actions in court were not known to Doctor M and contradicted his diagnosis.

The appellant has not pointed out, and we have not independently identified, any infirmity in the paragraph 121 inquiry board proceedings in this case. Instead, the board was promptly ordered by the military judge and comprehensively examined the appellant. She is not entitled to a diagnosis of her choice but rather a fair and impartial evaluation of her mental condition, and she got exactly that. Furthermore, having evaluated all the evidence which the military judge had before him, we conclude that he did not abuse his discretion in rejecting the appellant's paragraph 116 motion. The appellant had the burden of establishing the materiality and necessity of the requested expert's testimony by some specific showing. See *United States v. Salisbury*, 7 M.J. 425 (C.M.A. 1979); *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978); *United States v. Johnson*, 22-U.S.C.M.A. 424, 47 C.M.R. 402 (1973). She has not done so, instead providing only unsubstantiated hypothesis. These "undeveloped assertions that the requested assistance would be beneficial" are not

enough. *See Caldwell v. Mississippi*, 472 U.S. _____, 105 S.Ct. 2633, 2637 n.1, 86 L.Ed.2d 231 (1985). An offer of proof could have been made demonstrating expected expert testimony or textual excerpts could have been provided. *See United States v. Johnson*, 47 C.M.R. at 406. Considering the extensive observation, testing, and evaluation of the appellant, misdiagnosis of the appellant by the paragraph 121 inquiry board is highly unlikely, and Doctor M in his testimony unequivocally demonstrated the lack of validity in the appellant's proposition that her condition had changed between the inquiry board and trial. In the absence of any factual support for the defense request we are left with only speculation, and we are simply unpersuaded that the motion was anything more than an attempt to "stop around" for a psychiatrist who might favor the defense. Thus, we reject the appellant's claim.

We find that the proceedings in this case satisfied constitutional requirements, and we accordingly affirm the findings and sentence as approved on review below, except for the adjudged bad conduct discharge which we have already set aside.

MICHAEL D. RAPP

Senior Judge KERCHEVAL and Judge GRANT concur.

JOHN W. KERCHEVAL II

JOHN E. GRANT, JR.

APPENDIX C

UNITED STATES,)	USCMA DKT. No.
<i>Appellee</i>)	51801/NA
)	CMR Dkt. No. 83-5411
)	
)	ORDER
v.)	DENYING PETITION
)	FOR
)	RECONSIDERATION
SYLVIA E.)	
DAVIS (422-82-7402),)	
<i>Appellant</i>)	

On consideration of appellant's petition for reconsideration of this Court's order dated May 6, 1987 (24 M.J. 222), it is by the Court this 21st day of August, 1987

ORDERED:

That said petition is denied.
For the Court,

/s/ JOHN A. CUTTS, III

Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (BOLTON)
Appellate Government Counsel (MUSCHAMP)